Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT W. RANN, PETITIONER

v.

ELAINE CHAO, IN HER OFFICIAL CAPACITY AS SECRETARY, U.S. DEPARTMENT OF LABOR, HER AGENTS AND SUCCESSORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI SHOULD BE GRANTED TO RESOLVE A CLEAR SPLIT IN THE CIRCUITS AS TO WHETHER GIVING NOTICE DIRECTLY TO A GOVERNMENT AGENCY SATISFIES THE REQUIREMENTS OF 29 U.S.C. §633a(d)?

II. WHETHER CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FAILED TO FOLLOW *CHEVRON* PRINCIPLES AND RULED THAT THE AGENCY HAD THE LEGAL AUTHORITY TO CANCEL THE COMPLAINT?

III. WHETHER CERTIORARI SHOULD BE GRANTED TO RESOLVE THE TENSION BETWEEN DECISIONS OF THIS COURT ON THE AVAILABILITY OF ESTOPPEL AGAINST THE FEDERAL GOVERNMENT?

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PETITION FOR WRIT OF *CERTIORARI*

Petitioner, Robert Rann, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 346 F.3d 192, App. 1a.[1] The United States District Court for the District of Columbia issued two decisions at issue here. The first decision granted Defendant's Motion to Dismiss or for Summary Judgment, dismissing Rann's claims for lack of subject matter jurisdiction, and is reported at 154 F. Supp.2d 61, App. 14a. The second decision denying Rann's Motion for Reconsideration is reported at 209 F. Supp.2d 75, App. 27a.

JURISDICTION

The United States Court of Appeals for the District of Columbia denied Rann's Petition for Rehearing or Rehearing *En Banc* on January 6, 2004. App. 25a-26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (2003).

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[1] References to the Appendix to this Petition are the page number followed by "a."

RELEVANT PROVISIONS

The statute at issue before this Court is the Age Discrimination in Employment Act ("ADEA"), which authorizes federal employees to sue for discrimination in employment on the basis of age pursuant to 29 U.S.C. §633a(c) ("Any person aggrieved may bring a civil action in any Federal District court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of the Act.")

ADEA provides two separate paths for federal employees to proceed to court under the ADEA. App. 5a. One relevant portion of the ADEA allowing federal employees to file ADEA suits against their employers by following an administrative route provides:

> Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

* * * *

> (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

29 U.S.C. §633a(b).

The ADEA contains an alternate provision governing the file of ADEA suits by federal employees:

> When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

29 U.S.C. §633a(d).

The regulations provide in relevant part that "remedies will be considered to be exhausted for purposes of filing a civil action" with the passage of "180 days after the filing of an individual complaint if

the agency has not issued a final decision...." 29 *C.F.R.* 1614.201 (1998).

The regulations governing cancellation of administrative complaints provide:

> (g) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, ***provided that the request included a notice of proposed dismissal.*** However, instead of dismissing for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available.

29 C.F.R. § 1614.107(g) (1998) (emphasis added).

The applicable regulations further state in pertinent part:

> (a) As an alternative to filing a complaint under this part, an aggrieved individual may file a civil action in a United States district court under the ADEA against the head of an alleged discriminating agency after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, Federal

> Sector Programs, 1801 L St., NW., Washington DC 20507 within 180 days of the occurrence of the alleged unlawful practice.

29 C.f.R. §1614.201(a) (1998).

STATEMENT

I. Background Facts

In March, 1998, Rann was a 64-year-old veteran of the Armed Forces and a long-time employee of the Department of Labor with over 30 years of service to his government. Except for temporary promotions to GS-14, Rann had been a GS-13 Manpower Analyst in the Employment and Training Administration of the U.S. Department of Labor ("DOL") since 1982 and was very experienced in all facets of the GS-14 position at issue. Plaintiff's Statement of Material Facts Omitted by Defendant and Material Facts in Dispute at ¶¶143-145. R.52.[2] Although he was the best qualified candidate for the position, Rann was denied the position under circumstances demonstrating the agency violated the ADEA, when promotion was given to a younger, less qualified, less experienced candidate who had been preselected and who lacked a Veterans Preference eligibility. R.52. *See* App. at 2a.

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[2] "R" denotes the corresponding numbered entry in the District Court's electronic civil docket.

Rann applied for the position of GS-14, Manpower Analyst, ETA 97-081, advertised on November 3, 1997. Wandner, who was also the selecting official, found that Rann was "highly qualified" and had a "strong application." Wandner was familiar with Rann's skills because they had worked together for more than a year by March of 1998 when the promotion decision was announced. Wandner had given Rann "Outstanding" performance evaluations. R.52. *See* App. 2a.

In a letter from Wandner, ***dated*** March 16, 1998, but post-marked March 25, 1998, Rann was officially notified that he had not been selected for the position in question and Wandner selected another candidate. Rann did not receive ***official*** notification he had been denied the promotion until March 26, 1998. R.52; *See* App 2a-3a.

On March 20, 1998, after having been informally advised of the selection of Messenger, Rann sought clarification of the selection process from Wandner. On March 31, 1998, Wandner sent Rann a letter claiming that he had based his decision to hire the thirty-seven-year-old Messenger, over him based solely on Messenger's answers to three interview questions. Rann believes the questions were chosen to give Messenger an advantage. R. 52. *See* App 2a-3a. Rann recognized that he had been the victim of age discrimination when he was advised by Wandner that the selection of Messenger was not based on the objective requirements set forth in the Knowledge, Skills and Abilities, as required by the applicable regulations, but only on the interview questions. R.52.

2. Administrative Proceedings

On April 30, 1998, Rann filed an informal complaint with DOL's EEO office informing DOL that he was a member of a protected group, was 64-years-old, and had been denied a promotion because of his age. App 2a.

On May 28, 1998 the EEO Counselor submitted his "Summary Report," which contained sixteen exhibits and a detailed report on the counselor's interviews with the witnesses. *See* R. 52. Moreover, the "Summary Report" contained ***all*** of the information concerning his complaint which was available to Rann. R. 52.

Rann and the DOL entered a mediation program intended to facilitate early resolution of complaints of discrimination and to allow the agency to resolve his claims. The mediation was unsuccessful and on September 4, 1998, the agency advised Rann that he had fifteen days to file a formal complaint. On September 15, 1998, Rann timely filed a formal complaint with the DOL EEO office, supplementing his earlier filings. R. 52; App. 3a.

Shortly before filing his formal complaint on September 15, 1998, Rann met with Lillian Winstead to learn whether filing of a formal complaint would cause him to have to wait until the completion of the formal complaint process before he went to court. Ms. Winstead said she was not sure of the answer to Rann's question. App. 45a.

In Rann's presence, Ms. Winstead called the EEOC to request an answer to the question of whether he would have to wait until the completion of the formal complaint process. The party with whom Rann and Ms. Winstead spoke on the speaker phone said that Rann "could file a civil action immediately without using the formal complaint process *or* he could file a formal complaint and opt out of it any time he chose to do so." App. 45a-46a (emphasis in original). Rann was specifically advised that age discrimination was a special case and was treated differently than cases brought under Title VII of the Civil Rights Act of 1964. Rann was specifically advised that he did not have to continue exhausting administrative remedies and that he could terminate the administrative process at any time without prejudice. App. 46a *et seq.*

On October 7, 1998, the agency notified Rann that the DOL's EEO office had reviewed his complaint and the EEO Counselor's four-page single-spaced "Summary Report" of May 28, 1998. The agency notified Rann that if there was not a final agency decision within 180 days of his complaint, or March 15, 1999, he had an unqualified right to file suit in District Court. The October 7, 1998 letter from DOL never advised Rann that his right to file suit in U.S. District Court was in any way limited or conditioned on any actions he might take with respect to the administrative proceedings. R. 52; App 3a.

Rann provided a written statement that he was 64-years old and a member of a protected group; that he had been denied a promotion because of his age; and the agency action was taken under circumstances that give

rise to an inference of discrimination. Even though the agency already had this information, DOL's EEO investigator asked for an affidavit on November 12, 1998. R.52; App. 3a.

On May 5, 1999, at least 220 days after he filed his formal administrative complaint of discrimination, Rann received another letter from the DOL EEO office again claiming that "it is ***difficult*** to proceed with the investigation" without any affidavit giving his age and other information. (Emphasis added.) This letter threatened to cancel Rann's administrative complaint of age discrimination. R. 52; App. 3a.

On June 7, 1999, DOL's EEO office dismissed Rann's administrative complaint for alleged "failure to prosecute" pursuant to 29 CFR §1614.107(g). The June 7, 1999 letter advised Rann that he had 90 days within which to file suit and said nothing to indicate any limitations on his right to file suit. R.52; App. 3a.

3. Proceedings Below

A. District Court

On September 2, 1999, Rann filed his complaint within eighty-seven (87) days after the agency's final June, 1999 decision. App 3a; 17a. On August 20, 2001, the District Court dismissed the case after concluding the Motion should be treated as a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Rule 12(b)(1). *Rann v. Chao*, 154 F. Supp.2d 61, 63, n.1. App. 14a, 22a-24a. The District Court held that because plaintiff failed to exhaust his administrative remedies,

the Court lacked subject matter jurisdiction. App. 23a-24a.

Rann timely filed a Motion for Reconsideration, which the Court treated as a Rule 59(e) motion to amend or alter the judgment. *Rann v. Chao*, 209 F. Supp.2d 75 (D.D.C. 2002); App. 27a. The District Court denied this Motion on May 6, 2002. App. 41a. However, the Court concluded that Rann's filing of his complaint with the agency's EEO Office did not, as a matter of law, constitute the notice to the EEOC required by the statute and was, in any event, untimely. *Id.* App. 37a. Rann timely filed a Notice of Appeal. R.93.

B. Court of Appeals

The court of appeals affirmed. Although Rann gave timely notice of his claims of age discrimination directly to the agency, the court of appeals held he did not satisfy the requirements of 29 U.S. C. §633a(d) because he did not send notice of those claims through the EEOC so the EEOC could then notify the agency. App. 11a-13a.

The court of appeals also held that the agency had the authority to cancel Rann's complaint after the passage of 180 days from the filing of the formal complaint and that Rann had therefore failed to satisfy the requirements of 29 U.S. C. §633a(b). App. 8a-10a.

The court rejected Rann's estoppel argument, ruling that estoppel claims against the federal government are disfavored and that Rann should have known that the information the agency provided to him

was incorrect. App. 10a.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for review because the petition raises important questions of continuing national importance for federal employees who seek to file age discrimination complaints against the federal agencies where they work.

The court of appeals below noted that Rann "relies on cases from our sister circuits to support his argument that the requirement [of notice to the EEOC] can be met with a complaint filed with the employing agency's EEO office." App. 11a. However, the D.C. Circuit rejected those decisions, intentionally creating a split with the Seventh, Eighth, and Eleventh Circuits on whether notice given by a federal employee directly to his agency meets the statutory requirements. The court of appeals ruled Rann was required to give notice to the EEOC so the EEOC could give the notice to his agency, rather than allow Rann to notify the agency directly.

The decision below rendered in a Circuit where many federal employees are employed cavalierly reverses the long-standing practice recognized by this Court in *Stevens v. Department of Treasury*, 500 U.S. 1, 9-10 (1991). In *Stevens*, the employee was found to have satisfied the EEOC notice requirement by filing a formal complaint with his agency. No party or judge in that case disputed that such notice satisfied the statutory requirements of 29 U.S.C. §633(a)(d). *Id.*

In *Stevens*, the Solicitor General conceded that exhaustion of administrative remedies was not required for claims brought under ADEA. As Mr. Justice Stevens observed:

> Unlike Title VII, however, the Age Discrimination in Employment Act (ADEA) contains no express requirement that a federal employee complainant seek administrative relief. There is therefore no basis from which to infer that a complainant who has voluntarily sought administrative relief must exhaust all administrative remedies before proceeding to court. The Equal Employment Opportunity Commission, charged with interpretation of the ADEA, does not read the statute to require exhaustion by federal employees.

Id. at 500 U.S. at 11-12 (Stevens, J. concurring in part and dissenting in part).

The lower courts also rejected the logic of the court's precedent in *Dashnaw v. Pena*, 12 F.3d 1112, 1115 (D.C. Cir. 1994) (*per curiam*) which stated that "[s]uch notice [of intent to sue] must be given to the EEOC, or, alternatively to the plaintiff's employing agency." App. 12a. The court of appeals failed to recognize the *Dashnaw* court was simply acknowledging the accepted practice that notice to the agency was routinely treated as notice to the EEOC for the purposes of §633a(d) before and after the Supreme Court's decision in *Stevens, supra.*

The court of appeals rejected the EEOC's interpretation of its own regulations and ruled that the agency had the authority to cancel Rann's complaint after the passage of 180 days. This construction of the EEOC's regulations is contrary to well-settled principles of administrative law. The lower courts were bound to accept the EEOC's interpretation of its own regulations under *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), where the opinion is the product of a formal adjudication. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The lower courts adopted an incorrect legal standard in assessing Rann's estoppel claims. Where the agency affirmatively misled Rann, this Court's decision in *Irwin v. Veterans Administration*, 498 U.S. 89, 95 (1990) provides the rule of decision. The lower courts erroneously applied this Court's precedents in refusing to rule that the agency is estopped from dismissing Rann's claims on the grounds he failed to comply with the conditions precedent to filing suit under ADEA where Rann was affirmatively misled by the agency.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A CLEAR SPLIT IN THE CIRCUITS AS TO WHETHER GIVING NOTICE DIRECTLY TO A GOVERNMENT AGENCY SATISFIES THE REQUIREMENTS OF 29 U.S.C. §633a(d)

Rann met the requirements of 633a(d) when he filed informal and formal complaints of age discrimination directly with his agency. As the D.C.

Circuit noted, Rann "relies on cases from our sister circuits to support his argument that the requirement [of notice to the EEOC] can be met with a complaint filed with the employing agency's EEO office." App. 11a. The court of appeals also noted its decision split with *McIntosh v. Weinberger*, 810 F.2d 1411, 1425 n. 6, (8th Cir. 1987) (filing of formal complaint with employing agency constitutes filing a complaint with the EEOC), *vacated on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212, *and cert. denied*, 487 U.S. 1217 (1988). The court below also split with the Seventh Circuit's thoughtful analysis in *Bohac v. West*, 85 F.3d 306, 307 (7th Cir. 1996), which held that complaints filed with the agency's EEO office were deemed filed with the EEOC. The lower court also rejected the holding in *Ray v. Nimmo*, 704 F.2d 1480, 1484, n. 9 (11th Cir. 1983) (additional notice to EEOC not required); *accord*: *James v. U.S. Postal Service*, 835 F.2d 1265, 1267 (8th Cir. 1988).

The court of appeals' interpretation of §633a(d) conflicts with that adopted by three others circuits cited above on the grounds that notice to the agency's EEO office is inferior to giving notice directly to the EEOC. This reasoning is fundamentally flawed because giving notice directly to the agency's EEO office would be ***more*** efficient and ***more*** likely to bring about "prompt action to eliminate the unlawful practice" than requiring federal employees to filter such notice through a different agency which lacks the resources to accomplish the task within such a short period of time.

The D.C. Circuit below failed to correctly analyze the purpose or goals of requiring that notice be

given to the EEOC. As the Seventh Circuit observed in *Bohac*: "In light of the significant sharing of responsibilities between the EEOC and the agencies under the regulatory scheme, however, we believe that the goals of the 30 days' notice provision are sufficiently advanced through the filing of a formal administrative complaint." 83 F.3d at 310. *Bohac* correctly interprets the ADEA in holding that the notice requirements of §633a(d) are to be interpreted in light of the statutory purpose of giving notice to the agency and that the purposes of §633a(d) are satisfied when notice is given ***directly*** to the agency. Filtering the request through the EEOC adds nothing to the process and only adds to the delay in providing the requisite notice to the agency.

In contrast with the D.C. Circuit, the Eleventh Circuit concluded that where an employee has already consulted with the agency's EEO Counselor and filed a formal complaint, "[t]here remains no policy justifying a requirement of notice of intent to sue in this situation." *Ray v. Nimmo, supra*, 704 F.2d at 1484, n. 9 (additional notice not required because the agency has already received such notice).

Finally, the Eighth Circuit's analysis is consistent with the Seventh and Eleventh Circuits in holding that the filing of a formal complaint with the employing agency constitutes filing a complaint with the EEOC. *James v. U.S. Postal Service, supra*, 835 F.2d at 1267; *McIntosh v. Weinberger, supra*, 810 F.2d at1425 n. 6. The D.C. Circuit's holding in *Rann* splits from these other circuits in ruling that notice given directly to the agency is not adequate notice to the

EEOC for the purposes of 29 U.S.C. §633(a)(d).

The D.C. Circuit concluded that the purpose of the "30-day notice is supposed to trigger: EEOC action to eliminate the unlawful practices." App 12a. Requiring that the notice to the agency be filtered through the EEOC adds nothing to this statutory goal because the agency is already required to begin its own investigation upon receipt of the complaint of discrimination. The complaint places the agency on notice. Since the EEOC has established a mechanism for the administrative resolution of complaints of age discrimination brought by federal employees through the agency by using the resources and personnel of the agency, 29 C.F.R Part 1614, filtering the notice through the EEOC would not further assist the goal of eliminating the unlawful practices and would only cause the delay.

Rann repeatedly met the requirements of 29 U.S.C. §622a(b) by timely providing the agency with notice of his claims directly on at least three separate occasions from April through September, 1998 by meeting with an EEOC Counselor, by engaging in mediation and by timely filing a formal complaint of age discrimination. App.3a. Requiring Rann to filter his notice through the EEOC adds nothing to the process, except to create another procedural roadblock to a trial on the merits of his claims. Certainly, in this case, the agency had notice and an ample opportunity over many months to eliminate the unlawful practice, but did not do so. There is no sound policy reason to require the 30-day notice to the agency to be funneled through the EEOC, when doing so would only cause delay.

The court of appeals justified its creation of the split of the circuits on the grounds that the EEOC had intended to abrogate the custom and practice of allowing federal employees to provide notice directly to the agency. App. 8a. The court rejected the seminal decision of *Purtill v. Harris*, 658 F.2d 134, 138 (3rd Cir. 1981), on the grounds that this decision "relied on EEOC regulations that no longer exist." *Id.*

The D.C. Circuit interpreted the EEOC's regulations that notice to the EEOC must be sent to the "Commission" as evidence that the EEOC intended to abrogate the prior practice of providing the statutory notice directly to the federal agency. This argument lacks merit because in promulgating new regulations to restructure the complaints process for federal sector EEO complaints, the EEOC did not express any intention to end the practice of permitting federal employees to provide the statutory notice directly to the agency. In fact, the EEOC specifically stated that, "we did not make any changes to the substance of the section" governing administrative complaints brought under ADEA. 57 *Fed. Reg* 12644 (April 10, 1992). Accordingly, the change in the regulations provides no basis for concluding the notice to the agency no longer fulfills the statutory notice requirements Rann was required to provide.[3]

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[3] The D.C. Circuit suggests that the EEOC repealed prior regulations treating a complaint filed with the agency as filed with the EEOC. In support of this statement, the panel incorrectly cited 60 Fed.Reg. 43,371 (August 21, 1995). As the EEOC stated, 29 C.F.R. 1614, published on April 10, 1992 (57 Fed. Reg. 12634) replaced the prior complaint process located at 29 CFR Part 1613. The prior regulations in part 1613 were obsolete and no longer in

Thus, the court of appeals' reasoning is based on an erroneous reading of the applicable regulations. In 1989, the EEOC published a Notice of Proposed Rulemaking, *see* 54 FR 45747, proposing a restructured complaints process for ***newly-filed*** federal sector complaints that would be located at 29 C.F.R. Part 1614. *See* 57 *Fed. Reg* 12634 (April 10, 1992). At the time the new regulations were published in April, 1992, the existing regulations were located at 29 C.F.R. Part 1613. Both sets of regulations continued to exist until August 21, 1995, when the old regulations located at 29 C.F.R. Part 1613 were deleted. 60 FR 43371.

The lower court distinguished the decisions of the other Circuits by looking to this cosmetic change in the regulations. The D.C. Circuit overlooked the EEOC's specifically declared intent in 1992 ***not*** to make substantive changes in the processing of age discrimination complaints. *Compare* 29 C.F.R. §1613.513 and 29 C.F.R. §1614.201. Because there was no intent by the EEOC to make a substantive change in the filing regulations, but only a recodification of prior regulations, the D.C. Circuit's analysis is erroneous. Since the EEOC explicitly stated its intention to make no substantive changes in the regulations governing the processing of age discrimination complaints, the court of appeals' reliance on a stylistic change in the regulations is misplaced.

This Court should grant the Petition to resolve the split in the Circuits created by the District of

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effect, but they were not substantively different on this point.

Columbia Circuit.[4] The decisions of the Seventh, Eighth and Eleventh Circuits clearly hold that filing a complaint of age discrimination with the federal agency constitutes filing the required notice with the EEOC under §633(a)(d). These decisions are better reasoned because they look to the purpose of the notice requirement, rather than requiring sterile formalities and better meet the goals of the legislation. Moreover, the decisions from the other circuits are not based on a misreading of the EEOC's intention in recodifying its regulations. The Court should grant the Petition to resolve this split in the Circuits.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FAILED TO FOLLOW *CHEVRON* PRINCIPLES AND RULED THAT THE AGENCY HAD THE LEGAL AUTHORITY TO CANCEL THE COMPLAINT

The lower courts erroneously rejected Rann's argument that his right to go to court had been "perfected" by the running of 180 days from his formal September 15, 1998 complaint with the Labor

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[4] The Court of Appeals did not reach the issue of whether Rann's notice was timely. We submit Rann's notice was timely under 29 U.S.C. § 633a(d) as a matter of law. Rann's time for filing his notice could not have begun to run with the writing of the letter advising him he had not been selected for the position because he did not have that letter and did not have facts sufficient to place him on notice that he had been a victim of age discrimination. However, the Court need not address the timeliness issue.

Department's EEO office. App. 9a. The applicable regulations provide that a federal employee who filed an administrative complaint alleging age discrimination "remedies will be considered to be exhausted for purposes of filing a civil action" with the passage of "180 days after the filing of an individual complaint if the agency has not issued a final decision...." 29 C.F.R. 1614.201 (1998). Under the plain language of the regulation, Rann has exhausted his administrative remedies with the passage of 180 days from the time he filed his complaint and he therefore had an unqualified right to file the instant lawsuit in federal court.

In addition to relying on the plain language of the EEOC's regulations cited above, Rann also relied on EEOC decisions in cases such as *Koch v. Levitt*, 1997 WL 106419, at *5-6 (E.E.O.C.1997), which reversed an agency's dismissal of an EEO complaint, where the agency dismissed the complaint after the passage of 180 days. *Accord*: *Hwang v. Henderson*, Appeal No. 01983455, EEOC, Office of Federal Operations (April 29, 1999), 1999 WL 303871 (E.E.O.C.) (reversing dismissal for alleged failure to cooperate). The lower courts must defer to the EEOC's reasonable interpretation of its own regulations under *Chevron U.S.A, Inc. v. Natural Resources Defense Council, supra*, where the opinion is the product of a formal adjudication, *Christensen v. Harris County*, 529 U.S. at 587.

Because the EEOC has concluded that the agency loses the power to cancel an administrative complaint after the passage of 180 days, the agency's purported cancellation of Rann's administrative

complaint in June, 1999 is ineffective and void. Because Rann had an unqualified right to file suit, he could not lose or be deprived of his "perfected" right to file suit if he did not file by the time the agency's EEO office issued its June 7, 1998 letter. There is no legal justification for the agency's claim of statutory authority to rescind such a fully vested right to file suit. The agency's purported cancellation of Rann's administrative complaint of age discrimination is void.

Pursuant to the EEOC's regulations, as of March 15, 1999, Rann had a property interest, a "chose in action," against the agency under the ADEA that could not be taken away without due process and without prior notice. It is well settled that a "chose in action is a constitutionally recognized property interest." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). There is no basis under the due process clause for taking this property right to file suit away from Rann without prior notice of the intent to do so.

Rann never received notice that the agency would claim his right to file suit was in jeopardy after it had become "perfected." The agency never claimed a specific statutory basis for terminating the right of a victim of age discrimination for alleged failure to cooperate with the EEO process. There is no case law or legal precedent to support the agency's claim that Rann's right to file suit under the ADEA may be ***retroactively*** extinguished by agency action after the passage of 180 days.

There is no genuine issue of "penalizing the agency, " *see* App. at 9a, because the agency violated ADEA and then violated the applicable EEOC regulations by purporting to retroactively cancel Rann's administrative complaint without notice. Rather the panel's analysis penalizes Rann by allowing the agency to retroactively cancel his complaint without prior notice.

The EEOC's rule of decision set forth in *Koch v. Levitt*, *supra*, is that administrative remedies are automatically exhausted after the passage of 180 days. Under *Chevron* and its progeny, the lower courts were bound by the EEOC's case law finding that an agency lacks the authority to cancel an administrative complaint after the passage of 180 days. The Court should grant the Petition where the lower court has simply chosen to disregard the EEOC's rule of decision analyzing its own regulations in favor of one that is solely concerned with alleged prejudice to the agency.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE TENSION BETWEEN DECISIONS OF THIS COURT ON THE AVAILABILITY OF ESTOPPEL AGAINST THE FEDERAL GOVERNMENT

The Court should grant the Petition to address the unresolved and important issue regarding the availability of estoppel against the federal government and to correct the D.C. Circuit's failure to follow the teachings of this Court in *Irwin v. Veterans Administration*, *supra*, 498 U.S. at 95. The court of appeals below characterized Rann's claim as one based

on what "an unnamed EEOC employee told him." App. 10a. However, this description fails to take into account the fact that Ms. Lillian Winstead of the Department of Labor's EEO Office arranged the conference call with the EEOC employee to answer Rann's questions about the administrative process. Ms. Winstead placed the *imprimatur* of the Department of Labor on this "unnamed EEOC employee" because she represented to Rann that this EEOC official whom she telephoned had the expertise necessary to answer Rann's questions about the administrative process and provide him with reliable information.[5] *See* February 3, 2000 Declaration of Robert W. Rann, App. 45a, *et seq.*

As the Supreme Court explained in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33(1959):

> [N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar

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[5] Ms. Winstead did not deny that she advised Rann that he could opt out of the process. Brief for Appellee at 31-32, n. 12. Nor did Ms. Winstead deny that the EEOC representative advised Rann that he could opt out of the administrative process. Since failure to exhaust administrative remedies is an affirmative defense, which defendant bears the burden of pleading and proving, it is clear that the agency cannot carry the burden of proving this affirmative defense. *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997).

inequitable reliance on statutes of limitations.

Here, the agency's misleading and wrongful actions lulled Rann into reasonably believing he could opt out of the administrative process at any time. The agency never sought to disavow the information conveyed to Rann during that telephone call until many months after Rann filed suit.

Even if there were merit to the ruling that the agency had the power to cancel Rann's complaint after 180 days had elapsed, the agency is estopped by asserting the affirmative defense of failure to exhaust. *See Currier v. Radio Free Europe/Radio Liberty, Inc.*, 159 F.3d 1363, 1368 (D.C. Cir. 1998). However, the court below held that traditional principles of equitable estoppel do not apply to the federal government. The court of appeals felt it was bound by this Court's "powerful cautions against application of the doctrine to the government, *see Office of Personnel Management v. Richmond*, 496 U.S. 414, 424-431 (1990) as normally barring its use to undercut statutory exhaustion requirements." App. 10a.

The court below misread *Office of Personnel Management v. Richmond* in which this Court emphatically dismissed the notion that "erroneous oral and written advice given by a Government employee to a benefits claimant" would "give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law." *Id.* 415-416. This Court noted that the "whole history and practice with respect to claims against the United

States reveals the impossibility of an estoppel claim for money in violation of a statute."

But in *Richmond*, this Court explicitly rejected the application of the Solicitor General's prior request for a "sweeping rule" that "no estoppel will lie against the Government in any case." *Id.* at 423. *Richmond* thus stands for the narrower proposition that the federal government could not pay benefits which were not authorized by law denying payment of unauthorized funds.

In its next term, the Court squarely rejected the Solicitor General's argument that "sweeping rule" that "no estoppel will lie against the Government in any case." In *Irwin v. Veterans Administration, supra,* this Court held, "timeliness and exhaustion requirements are not jurisdictional in nature but rather are statutory conditions precedent to the instigation of litigation and are therefore subject to waiver, estoppel, and equitable tolling." *Id.* at 95. Once Congress has expressly waived sovereign immunity, a court should resort to ordinary principles of statutory construction and applying traditional rules of equitable tolling to statutory time limits for filing suit. In *Irwin*, the Court ruled that the rules for equitable tolling applicable to lawsuits against private employers articulated in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982), and *Crown Cork & Seal, Co. v. Parker*, 462 U.S. 345, 349 n. 3 (1983), were applicable in suits brought by federal employees There is no double standard on the availability of equitable estoppel for claims brought against the United States under the civil rights laws, including ADEA. Waivers of sovereign immunity are to

be construed by the ordinary tools of statutory construction. *Block v. Neal*, 460 U.S. 289, 298 (1982) (citations omitted.) Under the rulings of this Court, there is no basis for the "added gloss of strictness" or the "special rule" for analyzing claims of equitable estoppel. *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (citations omitted.); *Franconia Associates v. United States*, 536 U.S. 129, 145 (2002) (citations omitted). Thus, the teachings of *Glus v. Brooklyn Eastern District Terminal, supra*, apply here.

The court of appeals relied on *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C.Cir.1988) for the proposition that "[Estoppel's] application to the government must be rigid and sparing." App. 10a. In view of this Court's teachings in *Irwin*, this rule of decision certainly does not apply to claims under the ADEA.

The Court should grant the Petition to resolve the tension between the Court's decisions in *Irwin v. Veterans Affairs*, *Richmond*, and *Glus* and correct the error of the District of Columbia Circuit in failing to consider the teachings of *Irwin*.

CONCLUSION

The Court should grant the Petition to resolve the split in the Circuits as to whether the statutory notice of intent to sue under ADEA may be given directly to the agency, or whether the federal employee is required to funnel that notice through the EEOC.

The Court should grant the Petition to correct the error of the Court of Appeals in rejecting the mandate of *Chevron* and its progeny in declining to follow the EEOC's interpretation of its own regulations, which bars federal agencies from purporting to cancel an administrative complaint of discrimination after the passage of 180 days from the date of filing.

The Petition should also be granted to resolve the tension between *Richmond* and *Irwin v. Veterans Affairs* and decide the important issue of when equitable estoppel applies to the federal government.

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 02-5200

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT W. RANN,
APPELLANT

v.

ELAINE CHAO, SECRETARY OF LABOR,
APPELLEE

September 9, 2003, Argued
October 14, 2003, Decided

COUNSEL: John F. Karl, Jr. argued the cause for appellant. With him on the briefs was William P. Farley.

Michael J. Ryan, Assistant U.S. Attorney, argued the cause for appellee. On the brief were Roscoe C. Howard, Jr., U.S. Attorney, and R. Craig Lawrence and G. Michael Harvey, Assistant U.S. Attorneys.

JUDGES: Before: GINSBURG, Chief Judge, and SENTELLE, Circuit Judge, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

OPINIONBY: WILLIAMS

OPINION: WILLIAMS, Senior Circuit Judge: Robert W. Rann claims that the Department of Labor denied him promotion because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. The district court dismissed his complaint for lack of subject-matter jurisdiction, finding that Rann had not fulfilled the prerequisites for suit under either of the routes to court provided by the Act. He had not exhausted his administrative remedies, which both parties assumed was essential to suit under § 633a(b); nor had he provided the Equal Employment Opportunity Commission with notice of intent to sue, as required by § 633a(d). See Rann v. Chao, 154 F. Supp. 2d 61 (D.D.C. 2001) ("Rann I") (granting defendant's motion to dismiss or in the alternative for summary judgment); Rann v. Chao, 209 F. Supp. 2d 75 (D.D.C. 2002) ("Rann II") (denying plaintiff's motion to alter or amend judgment). Rann argues that the district court erred in both rulings. We affirm.

* * *

In November 1997 Rann, aged 64, was employed as a Manpower Analyst, GS-13, in the Department of Labor's Employment and Training Administration. The Department advertised and Rann applied for another position as Manpower Analyst, at a higher GS rating, GS-14. Rann interviewed for the position, but the Department notified him on March 16, 1998 that it had instead selected another employee, aged 37.

Believing that he had been passed over for the GS-14 position because of his age, Rann contacted a Labor Department Equal Employment Opportunity ("EEO") counselor and on April 30, 1998 filed an informal

complaint of discrimination with the Labor Department's EEO office, known as its Civil Rights Center. (Joint Appendix at 343.) On September 15, after an EEO counselor had investigated Rann's informal complaint, and Rann and the Labor Department had engaged in mediation without success, Rann filed a formal complaint of age discrimination with the Civil Rights Center.

In a letter dated October 7, 1998 the Civil Rights Center accepted Rann's formal complaint for investigation. The letter told Rann that it was his responsibility to cooperate with the EEO investigator by presenting a sworn affidavit, and warned him that failure to provide any requested information in the time the EEO investigator specified might result in the dismissal of his complaint for failure to prosecute. A Labor Department EEO investigator followed up with a letter dated November 12, 1998, asking Rann to submit an affidavit answering specific questions about his case. Despite the investigator's many attempts to secure Rann's affidavit over the next six months, Rann never complied. A May 5, 1999 letter again demanded the affidavit, saying that Rann's failure to provide it within five days would lead the investigator to recommend dismissal. Rann's attorney pleaded for still more time; in response, the EEO investigator wrote on May 18, 1999 giving Rann another 15 days and again warning him that if he failed to deliver the affidavit, the investigator would recommend dismissal for failure to prosecute. Rann never supplied the affidavit, and the Civil Rights Center dismissed his complaint on June 7.

On September 2, 1999 Rann filed this suit in district court. The government moved to dismiss for want of

jurisdiction or in the alternative for summary judgment; the district court granted the motion because of Rann's failure to meet the statutory prerequisites to suit. In so doing, it considered submissions outside the complaint. See Rann I, 154 F. Supp. 2d at 64. Rann argues that this was inappropriate on a motion to dismiss. Indeed, the provision of Rule 12(b) automatically converting 12(b)(6) motions into summary judgment motions is inapplicable to 12(b)(1) motions, see Haase v. Sessions, 266 U.S. App. D.C. 325, 835 F.2d 902, 905-08 (D.C. Cir. 1987), so the consideration of factual submissions outside the complaint might have involved error in the absence of the government's alternative motion for summary judgment. Given the motion, however, there was no error on that score. Because the district court considered facts outside the complaint, the judgment below is properly viewed as a grant of summary judgment. See Fed. R. Civ. P. 56. Our standard of review under Rule 56 is de novo. Tao v. Freeh, 307 U.S. App. D.C. 185, 27 F.3d 635, 638 (D.C. Cir. 1994).

We note that the district court's characterization of the exhaustion default as jurisdictional raises a potential complication. We have held that the timeliness and exhaustion requirements of § 633a(d) are subject to equitable defenses and are in that sense non-jurisdictional. See Kennedy v. Whitehurst, 223 U.S. App. D.C. 228, 690 F.2d 951, 961 (D.C. Cir. 1982); see also Zipes v. Trans World Airlines, 455 U.S. 385, 71 L. Ed. 2d 234, 102 S. Ct. 1127 (1982). But we have sometimes characterized non-compliance with similar requirements in comparable statutes as depriving the district court of "authority" to hear the plaintiffs' suit, see Cox v. Jenkins, 278 U.S. App. D.C. 312, 878 F.2d

414, 422 (D.C. Cir. 1989) (addressing exhaustion under the Education for All Handicapped Children Act), which sounds jurisdictional. As nothing turns on the characterization here, we explore the matter no further.

* * *

The ADEA broadly bars age discrimination in employment. And it provides a federal government employee two alternative avenues to judicial redress. First, the employee may bring a claim directly to federal court so long as, within 180 days of the allegedly discriminatory act, he provides the EEOC with notice of his intent to sue at least 30 days before commencing suit. 29 U.S.C. §§ 633a(c), (d). Second, the employee may invoke the EEOC's administrative process, and then sue if dissatisfied with the results. Id. §§ 633a(b), (c); Stevens v. Dep't of Treasury, 500 U.S. 1, 5-6, 114 L. Ed. 2d 1, 111 S. Ct. 1562 (1991). Rann argues that he was rightfully in court via both of these two routes; one, of course, would be enough.

Suit following administrative process under § 633a(b)

The district court found that Rann's non-cooperation with the Labor Department's EEO investigator represented a failure to exhaust his administrative remedies, and that therefore he could not bring his complaint to federal court under § 633a(b). Rann I, 154 F. Supp. 2d at 66.

There appears to be no language in the ADEA expressly requiring a federal employee who is not relying on § 633a(d) to have exhausted his alternative

administrative remedies. Section 633a(c) provides that a person aggrieved "may bring a civil action in any Federal district court of competent jurisdiction." And § 633a(b) generally authorizes the Commission "to enforce" the ban on age discrimination in federal employment and to issue "such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out" these enforcement responsibilities.

But § 633a(d) provides express prerequisites to suit (30 days advance notice of intent to sue, within 180 days of the discriminatory act's occurrence) by a claimant who "has not filed a complaint concerning age discrimination with the [Equal Opportunity Employment] Commission." 29 U.S.C. § 633a(d) (emphasis added). The clear implication is that other plaintiffs must have "filed" an appropriate administrative complaint. See 29 C.F.R. § 1614.106(a) (requiring administrative complaints to be filed with the complainant's agency). Because of the employee's right to use subsection (d), of course, this administrative filing requirement is in a sense "optional." Kennedy v. Whitehurst, 223 U.S. App. D.C. 228, 690 F.2d 951, 964 (D.C. Cir. 1982). And the ADEA is silent on whether a plaintiff who has started the administrative process by filing such a complaint must reasonably pursue the process, as an exhaustion requirement would ordinarily entail. See Stevens, 500 U.S. at 9 (recognizing necessity of administrative exhaustion under § 633a(b) as an open question). The circuits appear to be split. Compare Langford v. United States Army Corps of Eng'rs, 839 F.2d 1192, 1194-95 (6th Cir. 1988) (finding no exhaustion necessary because, under the regulations in effect at the time, the filing of a civil action by a federal employee did not

terminate the agency's processing of his complaint), and Bak v. Postal Service, 52 F.3d 241, 243-44 (9th Cir. 1995) (finding no exhaustion necessary because, under the regulations in effect at the time, the filing of a civil action by a government employee did terminate the agency's processing of his complaint), with Purtill v. Harris, 658 F.2d 134, 138 (3d Cir. 1981) (discussing policy reasons why a plaintiff who starts administrative proceedings under § 633a(b) must follow those proceedings to exhaustion before filing suit), and White v. Frank, 895 F.2d 243, 243-44 (5th Cir. 1990) (per curiam). We need not reach this issue, however, because the parties have assumed throughout that pursuit of the administrative remedy is required, at least during the agency's 180-day investigative period; in oral argument, Rann expressly acknowledged that assumption. See 29 C.F.R. § 1614.106(e)(2) (requiring agency to investigate complaint within 180 days of its filing); see also 29 U.S.C. § 633a(b)(3) (requiring the EEOC to provide for the acceptance and processing of complaints of discrimination on account of age in federal employment); 29 C.F.R. § 1614.201(c) (discussing when administrative remedies will be considered to be exhausted for purposes of filing a civil action); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Rather than contesting the need to exhaust, Rann argues that he fulfilled the need by meeting with the Labor Department's EEO counselor, providing the counselor with information, engaging in mediation with the Labor Department and filing a formal complaint of age discrimination. He says that he thus provided the Labor Department's EEO office with all the

information in his possession, so that it would have been futile to comply with that office's requests.

In fact, Rann in no way attempted to exhaust the administrative process. The EEO investigator, trying to see whether Rann could establish a prima facie case of discrimination, repeatedly asked for his signed affidavit. Rann neither complied with these requests nor provided any information beyond his initial submission. He explained in his deposition that he "thought [doing so] was a losing proposition; that nothing productive could come of that; that it would drag on forever, ever and ever." See Rann I, 154 F. Supp. 2d at 65 (quoting deposition). While Rann did provide the EEO counselor with information before filing his formal complaint, the EEO investigator was reasonable both (1) in requiring Rann to verify his complaint prior to beginning the investigation, and (2) in seeking additional details that might explain why Rann believed he was more qualified than the selected employee and what he meant when he said in his complaint that there was "a planned management decision to pre-select the selectee." Nothing in the EEO investigator's requests, plainly aimed at facilitating the investigation, gave Rann reason to believe a response would be futile. Cf. James v. United States Dep't of Health & Human Servs., 263 U.S. App. D.C. 152, 824 F.2d 1132, 1138 (D.C. Cir. 1987).

After months of Rann's stonewalling, the Labor Department dismissed his complaint under 29 C.F.R. § 1614.107(a)(7), part of the EEOC's regulations implementing the ADEA. Section 107(a)(7) calls for dismissal when a complainant has not answered a written request for information within 15 days of its

receipt, if the request included notice of such dismissal. Rann's non-response proceeded over a period more easily measured in weeks or months than in days, and the Department's letters of May 5 and May 18, 1999 plainly gave notice of likely dismissal.

Rann argues that the timing of this dismissal--after the running of the 180-day deadline for the Labor Department to have investigated his complaint--somehow renders the dismissal invalid or otherwise excuses his failure to exhaust. See 29 C.F.R. § 1614.106(e)(2) (requiring agency to investigate complaint within 180 days of its filing); § 1614.201(c)(1) (considering administrative remedies to be exhausted if agency has not taken final action within 180 days of the complaint's filing). He frames this as an argument that his claim had been "perfected" by the running of 180 days from his formal September 15, 1998 complaint with the Labor Department's EEO office. Rann's argument would, in effect, fault the Labor Department for not dismissing his complaint before, or perhaps at, the moment when the 180 days passed. We can imagine no basis for such a rule, and Rann offers none. He does cite an EEOC decision, Koch v. Levitt, 1997 EEOPUB LEXIS 143, 1997 WL 106419, at *5-6 (EEOC 1997), which reversed an agency's dismissal of a complaint where the agency's EEO office had dawdled until just before the 180 days had run, and then dismissed because of the complainant's refusal to respond to demands made thereafter. But here the agency acted early and often on Rann's complaint. We see no sense in Rann's proposal to turn his own obduracy into a basis for penalizing the agency.

Rann also claims that the Labor Department is estopped from making a failure-to-exhaust argument because an unnamed EEOC employee told him that he could opt out of the administrative process at any time. This is, of course, simply a claim of equitable estoppel; we have read the Supreme Court's powerful cautions against application of the doctrine to the government, see Office of Personnel Management v. Richmond, 496 U.S. 414, 419-24, 110 L. Ed. 2d 387, 110 S. Ct. 2465 (1990), as normally barring its use to undercut statutory exhaustion requirements, Deaf Smith County Grain Processors, Inc. v. Glickman, 333 U.S. App. D.C. 299, 162 F.3d 1206, 1214 (D.C. Cir. 1998), and Rann offers no reason why it should be available to him here. See also ATC Petroleum, Inc. v. Sanders, 274 U.S. App. D.C. 12, 860 F.2d 1104, 1111 (D.C. Cir. 1988) ("[Estoppel's] application to the government must be rigid and sparing."). Indeed, Rann has not attempted to prove the traditional elements of the estoppel doctrine, which would certainly be necessary before the court even considered whether to apply estoppel against the government here. Id. at 1111-12; see also Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-85, 92 L. Ed. 10, 68 S. Ct. 1 (1947) ("Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."); 29 C.F.R. § 1614.201(c) (setting out circumstances under which administrative remedies will be considered to have been exhausted).

Rann's dogged refusal to take part in the administrative process thus bars his ADEA suit insofar as it purports to be outside § 633a(d).

Suit following 30 days notice under § 633a(d)

Rann also argues that the district court erred in dismissing his complaint due to his failure to provide the EEOC with 30 days' notice of his intent to sue. Rann argues that by filing his formal complaint with the Labor Department's EEO office, he met the notice requirement of § 633a(d), and was therefore properly in federal court under that section.

Section 633a(d) reads in pertinent part: When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action... Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

29 U.S.C. § 633a(d) (emphasis added).

While the plain language of this statute requires the filing of a notice of intent to sue with the EEOC itself, Rann relies on cases from our sister circuits to support his argument that the requirement can be met with a complaint filed with the employing agency's EEO office. But the Third Circuit's decision on the point relied on EEOC regulations that deemed complaints filed with the employing agency's EEO office as equivalent to ones filed with the EEOC--regulations that no longer exist. Purtill v. Harris, 658 F.2d 134, 138 (3d Cir. 1981). See also McIntosh v. Weinberger, 810

F.2d 1411, 1425 n.6 (8th Cir. 1987) (citing Purtill but otherwise without discussion). The Seventh Circuit's decision in Bohac v. West, 85 F.3d 306 (7th Cir. 1996), also deemed complaints filed with the agency's EEO office as filed with the EEOC, relying on the "significant sharing of responsibilities between the EEOC and the agencies." Id. at 309-10. Supposing that the purpose of the 30-day notice requirement was solely to allow the EEOC to attempt reconciliation, the court expressed the belief that under the prevailing regulations such efforts would necessarily have already occurred, so that notice was unneeded. Id. at 310. See also Dashnaw v. Pena, 304 U.S. App. D.C. 247, 12 F.3d 1112, 1115 (D.C. Cir. 1994) (per curiam) (stating in dicta that "such notice [of intent to sue] must be given to the EEOC, or, alternatively, to the plaintiff's employing agency....").

But § 633a(d) clearly specifies that the 30-day notice is to go to the "Commission." Furthermore, the statute requires the EEOC, upon receiving a notice of intent to sue, to "promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice." 29 U.S.C. § 633a(d). Though notice to the agency's EEO office may lead naturally enough to notice to all prospective defendants, it is hard to see how it would bring about the other activity that the 30-day notice is supposed to trigger: EEOC action to eliminate unlawful practices.

The EEOC's current regulations also support a finding that a plaintiff who wants to proceed under § 633a(d) must transmit his intent-to-sue notice to the EEOC itself. They provide that "an aggrieved individual may

file a civil action in a United States district court ... after giving the Commission not less than 30 days' notice of the intent to file such an action. Such notice must be filed in writing with EEOC, at P.O. Box 19848, Washington, DC 20036...." 29 C.F.R. § 1614.201(a); compare 29 C.F.R. § 1613.214 (1995) (treating a complaint filed with an agency as filed with the EEOC) (repealed by 60 Fed. Reg. 43,371 (Aug. 21, 1995)).

Because Rann did not meet the notice requirements of § 633a(d), we agree with the district court that Rann cannot proceed to federal court by that route.

We note that Rann's claim of having supplied the statutory 30 days' notice turns on his assumption that his formal complaint with Labor's EEO office was the equivalent of notice to sue. Because of our ruling on where the notice must be filed, we needn't reach the validity of that assumption. See Rann II, 209 F. Supp. 2d at 81 n.4. Nor need we address the parties' dispute as to whether Rann filed that complaint within the 180 days from occurrence of "the alleged unlawful practice," as required by § 633a(d) for the notice to sue. Id. at 82.

* * *

The district court correctly ruled that plaintiff's suit was barred for failure to exhaust. Because of the consideration of facts outside the complaint, the correct disposition was grant of the defendant's alternative motion for summary judgment. As modified in that particular, the judgment of the court is

Affirmed.

Civil Action No.: 99-2349 (RMU), Document Nos.: 31, 33, 37, 40, 44, 51, 61, 64, 65, 67, 68

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT RANN,
Plaintiff,

v.

ELAINE CHAO, Secretary, U.S. Department of Labor,
Defendant.

August 20, 2001, Decided
August 20, 2001, Filed

COUNSEL: For Rann, Plaintiff: John F. Karl, Jr., McDonald & Karl, Washington, D.C.

For Chao, Defendant: AUSA G. Michael Harvey, Washington, D.C.

JUDGES: Ricardo M. Urbina, United States District Judge.

OPINIONBY: Ricardo M. Urbina

OPINION:

MEMORANDUM OPINION

GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the court on the defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. Alternatively, the defendant moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). n1 The plaintiff, Robert Rann ("the plaintiff" or "Mr. Rann"), brings this suit for damages under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., claiming that his employer, the U.S. Department of Labor ("DOL"), discriminated against him on the basis of his age. Specifically, the plaintiff alleges that his employer denied him a promotion because of his age and gave the promotion instead to a 38-year-old employee. See Compl. P 22. The defendant, Elaine Chao, is the Secretary of Labor ("the defendant"), named in her official capacity.

The defendant moves to dismiss this action under Rule 12(b)(1) on the ground that the court lacks subject-matter jurisdiction because the plaintiff failed to exhaust his administrative remedies. See Renewed Mot. for Summ. J. ("Mot. for Summ. J.") at 2. The defendant notes that the plaintiff himself concedes that he failed to provide the DOL's Equal Employment Opportunity ("EEO") office with the documentation needed to complete a formal investigation. See id.; Pl.'s Opp'n to Renewed Mot. for Summ. J. ("Pl.'s Opp'n") at 9-12. The plaintiff counters by asserting that because the EEOC had already obtained all necessary information through a previous informal investigation, this documentation was unnecessary and redundant. See Pl.'s Opp'n at 9.

For the reasons that follow, the court holds that because the plaintiff failed to comply with the EEOC's formal complaint process, he has failed to fully exhaust his administrative remedies before filing suit in this court. Accordingly, the court lacks subject-matter jurisdiction over this matter and will grant the defendant's renewed motion to dismiss.

II. BACKGROUND

Robert Rann, now age 66, is employed as a GS-13 Manpower Analyst in the Department of Labor's Employment and Training Administration. See Compl. P 5. He has been employed by the DOL since 1970. See id. In November 1997, the DOL advertised a GS-14 Manpower Analyst position, and Mr. Rann submitted an application. He interviewed for the position and was notified that he had not been selected on March 16, 1998. See Mot. for Summ. J. at 2. At the time, Mr. Rann was 64 years old. See Compl. P 5. The selectee, Jonathan Messenger, was 38 years old. See id. P 22.

Believing that he was the best qualified applicant interviewed for the GS-14 position, Mr. Rann wrote to the selecting official, Stephen Wandner, and asked for an explanation as to why he had not been selected. Mr. Wandner responded that Mr. Rann had not interviewed as well as Mr. Messenger. See Compl. P 23. Mr. Rann filed an informal complaint of age discrimination with the DOL's Civil Rights Center on April 23, 1998. See Mot. for Summ. J. at 3. He was assigned an EEO counselor in May 1998 and participated in an informal mediation process. See Compl. P 25. This informal counseling and mediation failed to resolve his situation,

so Mr. Rann filed a formal complaint of age discrimination in September 1998. See Compl. P 26.

The DOL's Civil Rights Center accepted this formal complaint for investigation in October 1998. Over the next six months, the EEO office sent Mr. Rann multiple requests for an affidavit, an initial step in the formal investigation. Mr. Rann never provided the EEO investigator with this information. See Mot. for Summ. J. at 4-6; Pl.'s Opp'n at 10-12. On June 7, 1999, the DOL's Civil Rights Office dismissed Mr. Rann's complaint for failure to prosecute. See Pl.'s Opp'n at 12. Three months later, Mr. Rann filed a complaint in this court.

In January 2000, the defendant made an initial motion to dismiss for failure to exhaust. This court denied that motion, allowing the plaintiff to seek relevant discovery in response to the defendant's non-cooperation allegation. See Mem. Op. dated July 26, 2000. The defendant now renews its motion to dismiss or for summary judgment. For the reasons that follow, the court will grant the defendant's motion to dismiss.

III. ANALYSIS

A. Legal Standard

On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. See District of Columbia Retirement Bd. v. United States, 657 F. Supp. 428, 431 (D.D.C. 1987). In reviewing a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), the court must accept all the complaint's well-pled factual

allegations as true and draw all reasonable inferences in the plaintiff's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); Pitney Bowes v. United States Postal Serv., 27 F. Supp. 2d 15, 19 (D.D.C. 1998) (Urbina, J.). The court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. See, e.g., Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

Moreover, the court need not limit itself to the allegations of the complaint. See Hohri v. United States, 251 U.S. App. D.C. 145, 782 F.2d 227, 241 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64 (1987). Rather, "the court may consider such materials outside the pleadings as it deems appropriate to resolve the question whether it has jurisdiction in the case." Scolaro v. D.C. Bd. of Elections and Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing Herbert v. National Academy of Sciences, 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992)).

B. ADEA Procedural Overview

The Age Discrimination in Employment Act is designed to prevent arbitrary age discrimination in employment. See 29 U.S.C. § 621 et seq. The ADEA gives a person who is at least 40 years old the right to seek relief if she has been evaluated by age rather than by ability. See 29 U.S.C. § 631. Under the ADEA, a plaintiff may bring an age-discrimination claim to federal court by either of two routes. The plaintiff may bring the claim directly to federal court, provided that she files the complaint within 180 days from the date of the alleged discriminatory conduct and provides at least 30 days

notice to the EEOC before commencing the suit. See 29 U.S.C. § 633a(b), (c) and (d). Alternatively, the plaintiff may elect to pursue administrative remedies and, if the plaintiff is dissatisfied with the result of the administrative proceedings, the plaintiff may file suit in federal court once she has fully exhausted her administrative remedies. See id.; Stevens v. Department of Treasury, 500 U.S. 1, 5-6, 114 L. Ed. 2d 1, 111 S. Ct. 1562 (1991) (describing two routes by which an ADEA claim may be brought to federal court).

Because the court has already held that this plaintiff has failed to allege facts sufficient to meet the requirements of the first of these two routes, see Mem. Op. dated July 26, 2000, the only question remaining is whether he fully exhausted his administrative remedies prior to filing suit in this court.

C. Failure to Exhaust Administrative Remedies

This court initially denied the defendant's motion to dismiss for failure to exhaust administrative remedies so that it could more fully examine the facts revolving around the plaintiff's cooperation. In its first Memorandum Opinion, this court noted that while the relevant portions of the ADEA statute, 29 U.S.C. § 633a(b) and (c), do not mention a cooperation requirement with regard to the exhaustion of administrative remedies, cases from this circuit and others state that a plaintiff's full cooperation is crucial. For instance, in Osborne v. Hove, Dkt. No. 97cv1630, slip op. (D.D.C. Jan 11, 1999) (HHK) (unpublished), the court granted the defendant's motion to dismiss for lack of subject-matter jurisdiction because it was

"undisputed" that the plaintiff refused to respond to the EEOC's requests for more information. See id. at 7. In Osborne, an employee at the FDIC alleged that he suffered race and sex discrimination. When the investigator of his formal complaint requested more information, the Osborne plaintiff refused to comply with those requests, stating that further participation in the administrative process would be futile. See id. at 3.

Similarly, the plaintiff in this case states that he failed to produce an affidavit for the EEOC because "I thought it was a losing proposition; that nothing productive could come of that; that it would drag on forever, ever and ever." See Rann Dep. at 85. The Osborne court held, however, that a plaintiff's full cooperation is necessary in administrative proceedings in order to have exhausted administrative remedies. "In the delicate area of discrimination, 'it is particularly important that the agency develop a record and have the opportunity to exercise its discretion, to apply its expertise, and, possibly, to discover and correct its own errors.'" See Osborne, slip op. at 7 (quoting Jordan v. United States, 522 F.2d 1128, 1132 (8th Cir. 1975)). Thus, the anti-discrimination purpose of the ADEA is served by making a plaintiff's full cooperation in administrative proceedings a key component of administrative exhaustion.

Under certain circumstances, futility may constitute an exception to the requirement of exhaustion of administrative remedies in the area of employment discrimination. See, e.g., Bachman v. Collier, 73 F.R.D. 300, 303 (D.D.C. 1976) ("This Court would not require exhaustion if it concluded that said exhaustion would be

no more than a futile act."). The futility exception is narrowly tailored, however, and a plaintiff bears a heavy burden to establish that the futility exception applies to his or her case. See, e.g., Callicotte v. Carlucci, 698 F. Supp. 944, 948 (D.D.C. 1988) ("This exception, as its name indicates, applies 'where following the administrative remedy would be futile because of certainty of an adverse decision.'"); Butler v. Kleppe, 1975 U.S. Dist. LEXIS 13019, 1975 WL 141, *1 (D.D.C. 1975).

The plaintiff in this case has not met his futility burden. Indeed, discovery has revealed that the plaintiff has no tenable excuse for his failure to prosecute. When the DOL's EEO office first accepted the plaintiff's formal complaint, the office sent him and his attorney a letter that specifically advised him:

it is your responsibility to cooperate with the EEO Investigator in the presentation of your affidavit. Without your statement, made under oath or affirmation, concerning the allegedly discriminatory agency actions about which you have filed your complaint, it is difficult to proceed with the investigation. You have the responsibility to provide your completed affidavit within the timeframe specified by the EEO Investigator. This serves as notice being given pursuant to the EEO regulations at 29 CFR 1614.107 (g), that if you failed to provide requested information in the time specified by the EEO investigator, your EEO complaint may be dismissed for failure to prosecute.

Mot. for Summ. J., Ex. 2.

The plaintiff offers no legitimate reason for his deliberate failure to pay heed to this and numerous subsequent warnings to comply with formal complaint proceedings. His claim that "there was absolutely no need for such a sworn statement because Mr. Rann's qualifications were a matter of record and the evidence of discrimination was solely in the hands of the agency and its officials" does nothing to justify his failure to comply with procedural requirements. See Pl.'s Opp'n at 9. Nor is the court persuaded by his argument that the EEO process is "long [and] drawn-out." See Rann Dep. at 68-74. The D.C. Circuit has rejected administrative remedy frustration as grounds for a finding of administrative futility. See Cox v. Jenkins, 278 U.S. App. D.C. 312, 878 F.2d 414, 419-20 (D.C. Cir. 1989) (holding that "plaintiffs' frustrations with the administrative process," while understandable, did not justify failing to exhaust their administrative remedies).

Because discovery has indicated that the plaintiff knowingly and deliberately failed to comply with the EEO's formal complaint procedures, and because the plaintiff has failed to meet the heavy burden of establishing a futility exception, the plaintiff has failed to exhaust his administrative procedures fully before filing suit. Consequently, the court lacks subject-matter jurisdiction over this case and grants the defendant's motion to dismiss.

D. The Plaintiff's Additional Motions

The plaintiff seeks to appeal the decisions of Magistrate Judge Deborah Robinson, which upheld the attorney-client privilege for conversations conducted before and

during the depositions of Mr. Wandner and Mr. Messenger, respectively. Because the court lacks subject-matter jurisdiction over this case, the court denies these discovery-related motions as moot. For the same reasons, the court need not address the plaintiff's motion for leave to strike Audrey Smith's Declaration.

Finally, the plaintiff now moves the court for leave to file a surreply brief since he contends that the defendant's reply brief raises new arguments. Even assuming arguendo that the defendant's reply brief did raise new arguments, the arguments that the plaintiff points to in his motion for leave to file a surreply all relate to the actual merits of the case. Since the court lacks subject-matter jurisdiction to hear the case, the court denies this motion as moot.

IV. CONCLUSION

For all these reasons, the court grants the defendant's motion to dismiss. An Order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously issued this 20 day of August, 2001.

Ricardo M. Urbina
United States District Judge

ORDER

GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

For the reasons stated in the court's Memorandum Opinion issued separately and contemporaneously this 20 day of August, 2001, it is

ORDERED that the defendant's motion to dismiss or, in the alternative, for summary judgment shall be and hereby is GRANTED; and it is

FURTHER ORDERED that all other motions are hereby DENIED as moot.

SO ORDERED.

Ricardo M. Urbina
United States District Judge

FOOTNOTES

n1 Although the defendant styles her motion as one for summary judgment, the gravamen of her motion is a motion to dismiss for failure to exhaust administrative remedies. Accordingly, the court will treat the defendant's motion as a motion to dismiss for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). See 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (1990) (noting that in these instances courts often "treat the motion for summary judgment as a 'suggestion' of lack of subject matter jurisdiction...").

No. 02-5200

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert W. Rann,
Appellant

v.

Elaine Chao, in her official capacity as Secretary, U.S. Department of Labor, her agents and successors,
Appellee

January 6, 2004, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Sentelle, Circuit Judge, and Williams, Senior Circuit Judge.

OPINION: ORDER

Upon consideration of appellant's petition for rehearing filed November 25, 2003, it

ORDERED that the petition be denied.

Per Curiam

No. 02-5200

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert W. Rann,
Appellant

v.

Elaine Chao, in her official capacity as Secretary, U.S. Department of Labor, her agents and successors,
Appellee

January 6, 2004, Filed

JUDGES: BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges.

OPINION: ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

Civil Action No.: 99-2349 (RMU)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT RANN,

Plaintiff,

v.

ELAINE CHAO, Secretary,
U.S. Department of Labor,
Defendant.

MEMORANDUM OPINION

DENYING THE PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

I. INTRODUCTION

This matter comes before the court on the plaintiff's motion to alter or amend the court's August 20, 2001 Memorandum Opinion ("Memorandum Opinion") granting the defendant's motion to dismiss.fn1 *Rann v. Chao*, 154 F. Supp. 2d 61 (D.D.C. 2001). Robert Rann ("the plaintiff" or "Mr. Rann") brings this suit for damages under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, claiming that his employer, the U.S. Department of Labor ("the DOL"), discriminated against him on the basis of his age. Specifically, the plaintiff alleges that his employer denied him a promotion because of his age and gave the promotion instead to a 38-year-old employee. Compl. ¶ 22. The defendant, Elaine Chao, is the Secretary of Labor ("the defendant"), named in her official capacity.

On September 4, 2001, the plaintiff filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). For the reasons that follow, the court holds that the plaintiff has not raised any grounds that would justify granting his motion and thus denies the plaintiff's motion to alter or amend the judgment.

II. BACKGROUND

As a GS-13 Manpower Analyst in the DOL's Employment and Training Administration, Mr. Rann has worked for the DOL since 1970. Compl. ¶ 5. In November 1997, the DOL advertised a GS-14 Manpower Analyst position, and Mr. Rann submitted an application. *Id.* ¶¶ 15-16. He interviewed for the position and the DOL subsequently notified him that it had not selected him in a letter Mr. Rann received on March 16, 1998. Compl. ¶¶ 20-21, 27; Mot. For Summ. J. at 2. At the time, Mr. Rann was 64 years old.fn2 Compl. ¶ 5. The selectee was 38 years old. *I*d. ¶ 22.

Believing that he was the best qualified applicant interviewed for the GS-14 position, Mr. Rann wrote to the selecting official, Stephen Wandner, and asked for an explanation as to why he had not been selected. Compl. ¶ 23. Mr. Wandner responded that Mr. Rann had not interviewed as well as the selectee. *I*d. Mr. Rann filed an informal complaint of age discrimination with the DOL's Civil Rights Center on April 23, 1998. Mot. for Summ. J. at 3. He was assigned an EEO counselor in May 1998 and participated in an informal mediation process. Compl. ¶ 25.

Because this informal counseling and mediation failed to resolve his situation, Mr. Rann filed a formal

complaint of age discrimination in September 1998. *Id.* ¶ 26.

The DOL's Civil Rights Center accepted this formal complaint for investigation in October 1998. Over the next six months, the EEO office sent Mr. Rann multiple requests for an affidavit, which is an initial step in the formal investigation. Mr. Rann never provided the EEO investigator with this information. Mot. for Summ. J. at 4-6; Pl.'s Opp'n at 10-12. On June 7, 1999, the DOL's Civil Rights Office dismissed Mr. Rann's complaint for failure to prosecute. Pl.'s Opp'n at 12. Three months later, Mr. Rann filed a complaint in this court.

In January 2000, the defendant moved to dismiss the complaint on the ground that the plaintiff had failed to exhaust his administrative remedies. This court denied that motion, allowing the plaintiff to seek relevant discovery in response to the defendant's non-cooperation allegation. Dkt. No. 99cv2349, Mem. Op. dated July 26, 2000. On August 20, 2001, the court granted the defendant's motion to dismiss, concluding that because the plaintiff failed to exhaust his administrative remedies, the court lacked subject-matter jurisdiction over the case pursuant to Federal Rule of Civil Procedure 12(b)(1). *Rann*, 154 F. Supp. 2d at 65-66.

On September 4, 2001, the plaintiff filed a motion to alter or amend the judgment, arguing that the parties never addressed the statute-of-limitations issue in their pleadings and that the court erred in its analysis. Pl.'s Mot. for Recons. at 1. In addition, the plaintiff argues that under the Equal Employment Opportunity

Commission's ("the EEOC" or "the Commission") own rules and regulations, the EEOC lacks the jurisdiction to dismiss claims for failure to prosecute. *Id.* Therefore, the plaintiff contends that because the court must follow the EEOC's interpretations of its own regulations, the court does have jurisdiction to hear the case. *Id.*

III. ANALYSIS

A. Legal Standard for Amendment of Judgment Pursuant to Rule 59(e)

Federal Rule of Civil Procedure 59(e) motions to alter or amend a judgment must be filed within 10 days of the entry of the judgment at issue.fn3 FED. R. CIV. P. 59(e); *W.C. & A.N. Miller Cos. v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997) (citing *Derrington-Bey*, 39 F.3d at 1226).

While the court has considerable discretion in ruling on a Rule 59(e) motion, the reconsideration and amendment of a previous order is an extraordinary measure. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996) *(per curiam)* (internal citations omitted*)*. Rule 59(e) motions "need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Id.* Finally, "[a] Rule 59(e) motion to reconsider is not simply an opportunity to reargue facts and theories upon which a court has already ruled," *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995), nor is it a vehicle for presenting theories or arguments that could have been advanced earlier. *W.C. & A.N. Miller Cos.*, 173 F.R.D. at 3.

B. ADEA Procedural Overview

The Age Discrimination in Employment Act ("ADEA") is designed to prevent arbitrary age discrimination in employment. 29 U.S.C. § 621 *et seq.* The ADEA gives a person who is at least 40 years old the right to seek relief if she has been evaluated by age rather than by ability.

29 U.S.C. § 631. Under the ADEA, a plaintiff who works for the federal government may bring an age-discrimination claim to federal court by either of two routes. 29 U.S.C. § 633a; *Equal Employment Opportunity Comm'n v. Wyoming*, 460 U.S. 226, 233 n.5 (1983), *modified on other grounds by* 29 U.S.C. § 623(i), as amended, 29 U.S.C. § 623(j). First, such a plaintiff may bring the claim directly to federal court if she provides at least 30 days notice to the EEOC of her intent to sue before commencing the suit *and* she files this notice within 180 days from the date of the alleged discriminatory conduct. 29 U.S.C. § 633a(d). Alternatively, the plaintiff may elect to pursue administrative remedies and, if the plaintiff is dissatisfied with the result of the administrative proceedings, the plaintiff may file suit in federal court once she has fully exhausted her administrative remedies. 29 U.S.C. § 633a(b); *Stevens v. Dep't of Treasury*, 500 U.S. 1, 5-6 (1991) (describing the two routes by which a federal employee may bring an ADEA claim to federal court).

C. The Court's Use of 29 U.S.C. § 633a(d)

As a preliminary matter, both parties point the court to its July 26, 2000 ruling regarding 29 U.S.C. § 633a(d). Pl.'s Reply at 2; Def.'s Opp'n at 8-9. In its July 26, 2000 Memorandum Opinion, the court ruled that the plaintiff

could not proceed to federal court under the non-administrative route described in Section III.B. *supra* because the plaintiff filed his complaint with the court "considerably beyond the 180-day limit." Dkt. No. 99cv2349, Mem. Op. dated July 26, 2000. The court acknowledges that this statement was incorrect. Looking directly at the language of the statute to clarify the issue, the court notes that 29 U.S.C. § 633a(d) states that:

no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred.

29 U.S.C. § 633a(d). This section of the statute places no statute of limitations on the filing of a complaint in federal court. *Id.* Rather, the statute simply requires the plaintiff to give the EEOC 30-days notice before filing a complaint in federal court and to file this *notice* (not the complaint) within 180 days from the date the alleged unlawful practice occurred. *Id.*; *Proud v. United States*, 872 F.2d 1066, 1067 (D.C. Cir. 1989). This specific statutory provision does not address, or in any way limit, the time period the plaintiff has to properly file a complaint in federal court. 29 U.S.C. § 633a(d). In sum, the court acknowledges that it misstated the statute's provisions in its July 26, 2000 Memorandum Opinion. Accordingly, the court clarifies that it reverses its earlier ruling to the extent that the earlier ruling stated that the plaintiff cannot bring his claim to federal court because he failed to file his complaint in this court

within 180 days of the alleged discriminatory conduct. Dkt. No. 99cv2349, Mem. Op. dated July 26, 2000 at 4.

D. The Plaintiff Cannot Proceed to Federal Court Under 29 U.S.C. § 633a(d)

Nevertheless, this error does not affect the outcome of the August 20, 2001 Memorandum Opinion. Accordingly, this was a harmless error. *Barth v. Gelb*, 2 F.3d 1180, 1188 (D.C. Cir. 1993); *Williams v. United States Elevator Corp.*, 920 F.2d 1019, 1022-23 (D.C. Cir. 1990).

The result does not change because the plaintiff still did not satisfy the first of the two paths to federal court, the non-administrative route. 29 U.S.C. § 633a(d). As the defendant correctly points out, the plaintiff failed to comply with the notice requirements of 29 U.S.C. § 633a(d) since he never filed the required notice with the EEOC of his intent to sue within the 180-day period after the alleged discriminatory action occurred. Def.'s Opp'n at 8-12. The plaintiff counters that by submitting his EEO complaint to the DOL's EEO office, he satisfied 29 U.S.C. § 633a(d)'s requirement that he give the EEOC notice of his intent to sue. Pl.'s Reply at 7-9; Def.'s Opp'n at 9-12.

The defendant responds by declaring that the precedent within this circuit favors its position that such notice to the agency does not constitute notice to the EEOC. Def.'s Opp'n at 9-12. While the D.C. Circuit has not spoken directly on the issue, other members of the United States District Court for the District of Columbia have addressed this point. *Hinton v. Solomon*, 475 F. Supp. 105, 108 (D.D.C. 1979) (Green, J.); *Carter v. Marshall*, 457 F. Supp. 38, 41-42 (D.D.C.

1978) (Flannery, J.). In *Hinton*, the court made clear that the purpose of Section 633a(d)'s requirement of providing notice to the EEOC is to permit the EEOC to contact the prospective defendants and take action to eliminate unlawful practices. *Hinton*, 475 F. Supp. at 108 (citing 29 U.S.C. § 633a(d)). "Although the filing of an administrative complaint would provide notice to prospective defendants, it would neither make the Commission aware of the alleged discrimination problem nor give the Commission the opportunity to exercise its directive to resolve the matter short of a judicial proceeding." *Id.*

The plaintiff rightly rebuts that courts have split on this issue. *Compare Ivey v. Rice*, 759 F. Supp. 394, 403 (S.D. Ohio 1991) (requiring the plaintiff to file a notice of intent to sue with the EEOC, not with the plaintiff's agency, to satisfy 29 U.S.C. § 633a(d)), *Hinton*, 475 F. Supp. at 108 (same), *and Carter*, 457 F. Supp. at 41-42 (same), *with Bohac v. West*, 85 F.3d 306, 309-10 (7th Cir. 1996), *McIntosh v. Weinberger*, 810 F.2d 1411, 1425 n.6 (8th Cir. 1987) (holding that the filing of a formal complaint with the employee's agency constitutes filing a complaint with the EEOC), *vacated on other grounds sub nom. Turner v. McIntosh*, 487 U.S. 1212 (1988), *Ray v. Nimmo*, 704 F.2d 1480, 1484 (11th Cir. 1983) (same), *and Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981) (same). Neither the Supreme Court nor the D.C. Circuit has yet to address this issue. In addition, the court notes that precedent from the sister district courts within this district and from other circuits is persuasive, not binding. In sum, the court has no precedent that it must follow on this issue. Having said that, the court agrees with the defendant's interpretation of 29 U.S.C. § 633a(d), as articulated by

precedent from this district. *Hinton*, 475 F. Supp. at 108; *Carter*, 457 F. Supp. at 41-42.

First, the *Hinton* logic is persuasive in that a plaintiff's filing of a notice only to the prospective defendants in the agency, but not to the EEOC, would not "make the Commission aware of the alleged discrimination problem nor give the Commission the opportunity to exercise its directive to resolve the matter short of a judicial proceeding." *Hinton*, 475 F. Supp. at 108. The government is a large employer. Simply providing notice to an official within the DOL, or, for example, the Department of Transportation, the Department of Health and Human Services, or the Department of Defense, does not necessarily ensure that an official within the EEOC will receive notice of a plaintiff's intent to sue. In addition, while the D.C. Circuit has not directly addressed the issue of whether giving notice to an agency rather than the EEOC satisfies Section 633a(d)'s requirements, it has declared that Section 633a(d) "prohibits a person who has not filed an administrative complaint concerning age discrimination from bringing suit until the person has given *the EEOC* notice of his intent to sue." *Proud*, 872 F.2d at 1067 (emphasis added). The best reading of this statement by the D.C. Circuit is that a plaintiff must give notice to the EEOC itself. *Id.*

Second, the EEOC's own regulation explicitly states that a plaintiff's ADEA notice of intent to sue "must be filed in writing with EEOC, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile within 180 days of the occurrence of the alleged unlawful practice." 29 C.F.R. § 1614.201(a) (1999). Because it lists no other option for giving notice,

the EEOC regulation serves as another point in favor of an interpretation that the plaintiff must provide notice to the EEOC itself.

Third, the plain language used by Congress in 29 U.S.C. § 633a(d) specifically states that the plaintiff must give "*the Commission* not less than thirty days' notice of an intent to file such action." 29 U.S.C. § 633a(d) (emphasis added). Accordingly, for the plaintiff's argument to succeed, the court would have to insert the words "or any prospective defendants" into the statute after the words "the Commission." *Id.* Congress deliberately chose not to insert this additional language. It is a well-established principle that when interpreting a statute, a court should "absent a clear indication to the contrary, . . . read the statute so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory." Norman J. Singer, Sutherland Stat. Constr. § 46.03.

Fourth, the additional language of 29 U.S.C. § 633a(d) further supports the defendant's position. The last sentence of the section reads: "Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice." 29 U.S.C. § 633a(d). The fact that Congress envisions a system whereby the Commission shall notify the "prospective defendants" that the Commission has received a plaintiff's notice of intent to sue strongly suggests that Congress specifically intended that the plaintiff give proper notice to the Commission. This sentence of the section renders the plaintiff's interpretation unworkable. After all, under the plaintiff's

interpretation, if the plaintiff provides notice to the prospective defendants *alone*, a court should deem such notice sufficient under 29 U.S.C. § 633a(d). But how could the Commission "notify all persons named therein as prospective defendants" if the Commission itself has never received notice? Framing the question in this manner serves to totally undermine the plaintiff's position.

For all these reasons, the court holds that the plaintiff's notice to the DOL of his intent to sue does not satisfy Section 633a(d)'s notice requirements since the plaintiff failed to notify the Commission of his intent to sue.fn4 Accordingly, the plaintiff cannot proceed to federal court via the non-administrative course of action contemplated by 29 U.S.C. § 633a(d).

One final point on this subject merits attention. The court also agrees with the defendant's contention that even if the plaintiff's filing of the formal administrative complaint with the DOL constituted proper notice under 29 U.S.C. § 633a(d), the plaintiff still did not file within the required 180 days of the allegedly discriminatory action. 29 U.S.C. § 633a(d). As the court has already noted, the plaintiff learned of his non-selection on March 16, 1998. *Rann*, 154 F. Supp. 2d at 63. Accordingly, since the plaintiff did not file his formal administrative complaint with the DOL until September 15, 1998, or 183 days thereafter, the plaintiff would not have given timely notice under the statute. 29 U.S.C. § 633a(d).

The court does not accept the plaintiff's sudden recollection – stated for the first time in his Rule 59(e) motion to alter or amend the judgment – that he

learned of his non-selection *only* on March 25, 1998. Pl.'s Mot. at 4-5. Indeed, the court raises its eyebrows at this transparent attempt by the plaintiff to save his case. After all, the court and the defendant first learned of the date that the plaintiff had received notice of his non-selection from *the plaintiff's own complaint*.

Compl. ¶¶ 21, 27. As the complaint alleged:

On March 16, 1998, Mr. Rann received a letter from Mr. Wandner, informing him that he was not selected for the ETA 97-081, Manpower Analyst GS-14 position for which he had applied.

Id. ¶ 21. In another paragraph, the complaint claimed that:

The time for Mr. Rann to file an informal complaint of discrimination with respect to the discrimination on the basis of age did not begin to run until March 16, 1998, when Mr. Rann first learned that the applicant who was appointed to the vacant GS-14 position was only 38 years of age and was less experienced and qualified.

Id. ¶ 27. The plaintiff's new argument that he was only "informally advised" of his non-selection on March 20, 1998 and that the 180-day clock should not start running until March 26, 1998, when he supposedly received the letter, smacks of a last-gasp attempt to prop up an anemic argument. Pl.'s Mot. at 2-5.

Furthermore, the plaintiff never offers an explanation for this dramatic *deus ex machine* that only appears for the first time in the plaintiff's post-judgment motion to alter or amend the judgment. The court points out that

well-settled case law dictates that a party is generally bound by the facts it alleges in its pleadings. *E.g.*, *Schott Motorcycle Supply, Inc. v. American Honda Motor Co.*, 976 F.2d 58, 60-61 (1st Cir. 1992). In this case, then, the plaintiff's assertion in his complaint that he received the letter informing him of his non-selection on March 16, 1998 binds him to that fact. Compl. ¶¶ 21, 27. Accordingly, even under this approach, the plaintiff would not have timely filed his notice of his intent to sue within the 180 days required by 29 U.S.C. § 633a(d).

E. The Plaintiff Has Not Given the Court Any Sound Reason to Alter or Amend its Ruling that the Plaintiff Failed to Exhaust His Administrative Remedies Under 29 U.S.C. § 633a(b)

As discussed earlier, a federal-employee plaintiff has a second avenue to federal court. Namely, she can pursue her administrative remedies and, if she is dissatisfied with the result of the administrative proceedings, she may file suit in federal court once she has fully exhausted her administrative remedies. 29 U.S.C. § 633a(b); *Stevens*, 500 U.S. at 5-6.

The main thrust of the court's August 20, 2001 Memorandum Opinion was that the plaintiff failed to exhaust his administrative remedies because he could not meet the burden established by his futility argument. *Rann*, 154 F. Supp. 2d at 65-66; *Callicotte v. Carlucci*, 698 F. Supp. 944, 948 (D.D.C. 1988) (stating that "[t]his exception, as its name indicates, applies 'where 'following the administrative remedy would be futile *because of certainty of an adverse decision*.'"); *Bachman v. Collier*, 73 F.R.D. 300, 303 (D.D.C. 1976) (reasoning that "[t]his Court would not require

exhaustion if it concluded that said exhaustion would be no more than a futile act.").

1. The Court Denies the Plaintiff's Rule 59(e) Motion

The plaintiff filed his motion within the 10-day period set for Rule 59(e) motions. FED. R. CIV. P. 59(e). As such, the court will treat the motion as a Rule 59(e) motion to alter or amend the judgment. *United States v. Emmons*, 107 F.3d 762, 764 (10th Cir. 1997) (applying filing-date-determinative rule); *Small v. Hunt*, 98 F.3d 789, 797 (4th Cir. 1996) (treating filing as Rule 59(e) motion when it was not filed later than 10 days after judgment was entered).

In this case, however, the plaintiff has failed to set forth adequate grounds for relief under Rule 59(e). FED. R. CIV. P. 59(e). First, the plaintiff does not point the court to any intervening change in law that would warrant the court's amendment of this portion of its August 20, 2001 Memorandum Opinion. *Firestone*, 76 F.3d at 1208; Pl.'s Mot. for Recons. at 2-9. Second, the plaintiff fails to present any new or previously unavailable evidence that would cause the court to alter its conclusions. *Id.* Third, the plaintiff does not demonstrate any need "to correct a clear error or prevent manifest injustice."5 *Firestone*, 76 F.3d at 1208.

In his motion to alter or amend the judgment pertaining to Section 633a(b), the plaintiff merely raises arguments that the court has already considered and rejected in its August 20, 2001 Memorandum Opinion. *Rann*, 154 F. Supp. 2d at 65-66; *New York v. United States*, 880 F. Supp. at 38 (ruling that "[a] Rule 59(e) motion to reconsider is not simply an opportunity to

reargue facts and theories upon which a court has already ruled"). The plaintiff's disagreement with the court's analysis and conclusions does not satisfy any of Rule 59(e)'s criteria for altering or amending the court's judgment. *New York*, 880 F. Supp. at 39. "Only if the moving party presents new facts or a clear error of law which 'compel' a change in the court's rulings will the motion to reconsider be granted." *Id.* (quotations omitted). The plaintiff has not met the burden imposed by Rule 59(e). Accordingly, the court denies the plaintiff's motion in its entirety.

IV. CONCLUSION

For all these reasons, the court denies the plaintiff's motion to alter or amend the judgment. An order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously issued this ____ day of May, 2002.

_____

Ricardo M. Urbina
United States District Judge

Footnotes

1 The plaintiff calls his motion "Plaintiff's Rule 59 Motion for Reconsideration." Pl.'s Mot. for Recons. at 1. Because the Federal Rules of Civil Procedure do not contain anything known as a "Motion for Reconsideration," the court will treat the plaintiff's motion as a motion to alter or amend the judgment as per Federal Rule of Civil Procedure 59(e) since he filed it within 10 days of entry of the court's Memorandum Opinion. FED. R. CIV. P. 59(e).

2 When he filed this lawsuit, Mr. Rann was 66 years old. Compl. ¶ 5.

3 For a Rule 59(e) motion to be timely, the movant must file the motion within 10 business days after the court's judgment is entered into the court's civil docket. FED. R. CIV. P. 6(a); *Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1224-26 (D.C. Cir. 1994). The D.C. Circuit has clarified that for Rule 59(e) motions, three days are not added to the time requirement when service is by mail, and district courts do not have the discretion to enlarge the 10-day period. *Derrington-Bey*, 39 F.3d at 1225; *see also* FED. R. CIV. P. 6(e) and 6(b). "The period is to be kept short presumably because a timely Rule 59(e) motion deprives the judgment of finality." *Derrington-Bey*, 39 F.3d at 1225. In addition, when a party files a timely Rule 59(e) motion, the time for appeal runs from the entry of the order that disposes of the motion. *Id.* at 1226.

4 Even assuming *arguendo* that the plaintiff's filing of the formal administrative complaint with the DOL constituted valid notification under 29 U.S.C. § 633a(d), the defendant properly observes that the plaintiff's formal administrative complaint never mentioned that the plaintiff intended to file suit in federal court. Def.'s Opp'n at 11-12 (citing Def.'s Mot. for Summ. J. Ex. 1). Accordingly, even under the most favorable possible interpretation of the statute for the plaintiff, he never gave notice to any governmental office that he intended to file suit in federal court.

5 While the court has already acknowledged the harmless error it made in its July 26, 2000

Memorandum Opinion, this error only related to one of the two approaches an ADEA plaintiff may take to bring a case to federal court, i.e., the non-administrative route contemplated by 29 U.S.C. § 633a(d). The error in no way affects the court's analysis in its August 20, 2001 Memorandum Opinion pertaining to the course of action in which a plaintiff must exhaust her administrative remedies before filing suit in federal court, as contemplated in 29 U.S.C. § 633a(b).

Civil Action No.: 99-2349 (RMU)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT RANN,

Plaintiff,

v.

ELAINE CHAO, Secretary,
U.S. Department of Labor,
Defendant.

ORDER
DENYING THE PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

For the reasons set forth in the court's Memorandum Opinion issued separately and contemporaneously this _____day of May, 2002, it is **ORDERED** that the plaintiff's motion to alter or amend the judgment is **DENIED.**

SO ORDERED.

Ricardo M. Urbina
United States District Judge

C.A. No. 99-2349 RMU

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT W. RANN
Plaintiff,

v.

ALEXIS HERMAN, In her official capacity as Secretary, U.S. DEPARTMENT OF LABOR,
Defendant.

DECLARATION OF ROBERT W. RANN

1. I am the plaintiff in the above-captioned action and I make this Declaration in support of Plaintiff's Opposition to Defendant's Motion for Protective Order and Plaintiff's Opposition to Defendant's Motion to Dismiss to explain my understanding of the administrative process when I filed my complaint of age discrimination against the Department of Labor based on representations made to me by government officials during the administrative process.

2. Shortly after I received the letter from Steve Wandner informing me that l had not been selected for the position of Manpower Analyst GS-14, I met with Ms. Lillian Winstead of the Department of Labor's EEO Office to discuss the steps I must take to file my complaint of discrimination with her office. Ms. Winstead informed me that I had 45 days in which to file a complaint of discrimination.

* * *

6. Ms. Winstead advised me that I had 15 calendar days to file a formal complaint with the Office of Civil Rights. I met with her on September 15, 1998 to discuss the formal complaint process and my rights to skip the formal complaint process and go directly to federal court with my complaint of age discrimination.

7. Both in the printed material I had received and in the governing regulations, the Department made it clear that age discrimination was an exception to, and was treated differently, in the administrative process.

8. I was advised that as an alternative to filing an administrative complaint, that I could file a civil action in United States district court after giving not less than 30 days notice of the intent to file. I was advised that when an individual has filed an administrative complaint alleging age discrimination, administrative remedies will be considered exhausted for the purposes of filing a law suit.

9. However, I wanted to know from Ms. Winstead whether a filing of a formal complaint would cause me to have to wait until the completion of the formal complaint process before I went to court. She was not sure of the answer to my question.

10. In my presence Ms. Winstead called the EEOC to request an answer to the question of whether I would have to wait until the completion of the formal complaint process. The party with whom we spoke on the speaker phone said that I "could file a civil action immediately without using the formal complaint

process or [I] could file a formal complaint and opt out of it any time I chose to do so." I was specifically advised that age discrimination was a special case and was treated differently than cases brought unther Title VII of the Civil Rights Act of 1964. I was specifially advised that I did not have to continue exhausting administrative remedies and that I could terminate the administrative process at any time without prejudice.

11. At no time did the Department of Labor ever advise me that I would be prejudiced by allowing an administrative investigation to continue or that my right to file a lawsuit over my complaint of age discrimination would be affected in any way by the fact of my participation in the administrative process.

* * *

Subscribed and sworn to under the penalty of perjury this 3rd day of February, 2000.

Robert W. Rann